BRB No. 96-0292 BLA

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| HELEN YALE<br>(Widow of BOYD YALE)<br><br>Claimant-Petitioner<br><br>v.<br><br>ISLAND CREEK COAL COMPANY<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order of Christine M. Moore, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell), Lebanon, Virginia, for claimant.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (93-BLA-0754 and 93-BLA-1942) of

[1] Claimant is Helen Yale, widow of Boyd R. Yale, the miner, whose application for benefits filed on November 16, 1984 was pending when he died on January 31, 1992. Director's Exhibits 1, 3. His claim was denied in a Decision and Order issued on March 31, 1992. Director's Exhibit 101. Mrs. Yale requested modification of the miner's claim and subsequently filed her own claim for benefits on April 9, 1992.

Administrative Law Judge Christine M. Moore denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

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Director's Exhibits 1, 108-09. Both claims were consolidated by the administrative law judge's order dated June 16, 1995. Administrative Law Judge Exhibit 3.

U.S.C. §901 *et seq*. (the Act). Initially, Administrative Law Judge Lawrence E. Gray credited the miner with forty-six years of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 101. Accordingly, benefits were denied.

Claimant timely requested modification[2] pursuant to Section 725.310, filed a survivor's claim, and submitted new evidence. On modification of the miner's claim, Judge Moore found that, although the evidence of record failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, the existence of simple pneumoconiosis and total respiratory disability were established pursuant to Sections 718.202(a)(4) and 718.204(c). The administrative law judge concluded, however, that the evidence failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) and, accordingly, denied benefits. The administrative law judge also found the evidence insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c) and denied benefits on the survivor's claim.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Sections 718.304, 718.204(b), and 718.205(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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[2] Claimant initially appealed Judge Gray's Decision and Order to the Board, but withdrew her appeal and requested remand to the district director for modification proceedings. Director's Exhibits 105, 108. The Board granted claimant's request and remanded the case by order dated January 23, 1993. Director's Exhibit 109.

[3] We affirm as unchallenged on appeal Judge Gray's finding regarding length of coal mine employment and Judge Moore's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge impermissibly discredited the autopsy prosector's diagnosis of complicated pneumoconiosis pursuant to Section 718.304. Claimant's Brief at 2. Section 718.304 provides for an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which "when diagnosed by biopsy or autopsy, yields massive lesions in the lung." 20 C.F.R. §718.304(b).[4] Massive lesions resulting from pneumoconiosis are sometimes described as progressive massive fibrosis. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1191 n.1, 19 BLR 2-304, 2-311 n.1 (4th Cir. 1995).

In their autopsy report, Drs. Lininger and Roggli[5] diagnosed "coal workers' pneumoconiosis . . . with bilateral progressive massive fibrosis," which they described as several "rubbery," "white fibrous-appearing and black-pigment laden" tissue masses in the miner's lungs measuring from two to five-and-a-half centimeters. Director's Exhibit 112. One of the masses also contained "tan-white softer tissue that crumbles to palpation with forceps." *Id*. They opined that the miner died "due to adenosquamous carcinoma of the lung, in the setting of coal workers' pneumoconiosis with progressive massive fibrosis, severe emphysema, chronic bronchitis and pneumonia." *Id*.

Dr. Kleinerman, board-certified in anatomical and clinical pathology,[6] reviewed

[4] Sections 718.304(a) and (c), which provide for the diagnosis of complicated pneumoconiosis by x-ray or other means yielding results equivalent to x-ray, biopsy, or autopsy diagnosis, are inapplicable inasmuch as the record contains no relevant evidence.

[5] The record indicates that Dr. Lininger, the prosector, was a first-year resident in training at Duke University Medical Center at the time of the autopsy and was not a pulmonary specialist. Employer's Exhibit 4. Dr. Roggli, who consulted on the pulmonary aspects of the autopsy, is a board-certified pathologist. Employer's Exhibit 4.

[6] The record also indicates that Dr. Kleinerman, who chaired the committee that

the miner's medical records, autopsy report, and slides, and diagnosed simple pneumoconiosis. Director's Exhibits 11, 112. He concluded that Drs. Lininger and Roggli mistook masses of cancerous tumor for complicated pneumoconiosis, the "characteristic mass" of which, he explained, is a "very dense, rock-hard nodular lesion, uniformly black or black with speckled gray areas" which "would not be white and would not crumble on touch." Director's Exhibit 113; Employer's Exhibit 1 at 23-27.

Contrary to claimant's contention, the administrative law judge permissibly accorded greater weight to Dr. Kleinerman's opinion based on his superior credentials, greater experience in diagnosing pneumoconiosis, and his "better explained" report which was supported by the autopsy findings. Decision and Order at 35; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, the administrative law judge found the reports of Drs. Morgan, Caffrey, Fino, Abernathy, Tuteur, and Iosif to be consistent with Dr. Kleinerman's diagnosis. Decision and Order at 35; Director's Exhibit 112; Employer's Exhibits 1-3, 5-9.

Additionally, the administrative law judge noted that Dr. Perry retracted his opinion that the miner had complicated pneumoconiosis after reading Dr. Kleinerman's analysis. Decision and Order at 35; Director's Exhibit 11. Inasmuch as the administrative law judge is not required to accord determinative weight to the autopsy prosector's report, *Urgolites v. BethEnergy Mines, Inc*., 17 BLR 1-20, 1-22 n.3 (1992); *see Gruller v. BethEnergy Mines Inc*., 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985), and provided valid reasons for her weighing of the evidence, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.304.

Pursuant to Section 718.204(b), claimant contends that the administrative law judge impermissibly discredited the treating physician's opinion. Claimant's Brief at 2. Dr. Kirby, who stated that he treated the miner "off and on for several years" wrote several brief letters in which he opined that the miner was totally disabled due

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developed the pathology standards for diagnosing coal workers' pneumoconiosis, is the Director of the Pathology Department at Cleveland Metro Hospital and Chairman of the Pathology Department at the Case Western Reserve University School of Medicine. Employer's Exhibit 14.

to pneumoconiosis. Director's Exhibits 9, 20, 49.

Contrary to claimant's contention, the administrative law judge permissibly concluded that, although a treating physician's opinion may be accorded additional weight, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992), Dr. Kirby's opinions[7] did not merit such weight because they were "insufficiently explained or documented." Decision and Order at 37; *see Clark*, *supra*. The administrative law judge permissibly credited as more "persuasive" and "convincing," *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), the opinions of Drs. Kleinerman, Tuteur, Morgan, Fino, Abernathy, Stewart, and Iosif that the miner's pneumoconiosis was too mild to have contributed in any way to his total disability, which was due to severe pulmonary impairments related to his smoking history. Decision and Order at 37; Director's Exhbits 112, 113; Employer's Exhibits 1-3, 6, 7, 9-11. Therefore, we reject claimant's argument.

We also reject claimant's contention that the administrative law judge mischaracterized Dr. Robinette's opinion. Claimant's Brief at 3. The administrative law judge stated that she was "not persuaded" by Dr. Robinette's "equivocal conclusion" that the miner was totally disabled due to pneumoconiosis in light of other medical opinions that his total disability was caused by a severe obstructive impairment related to smoking. Decision and Order at 37.

Claimant points to Dr. Robinette's statement that "Mr. Yale meets all the criteria for pulmonary disability under the Department of Labor guidelines," in support of her argument that Dr. Robinette's causation opinion was not equivocal. Claimant's Brief at 3. Dr. Robinette's statement addresses the existence of total respiratory disability, not causation, and the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), or interfere with credibility determinations unless they are inherently incredible or patently unreasonable, *see Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Because the administrative law judge permissibly credited medical opinions sufficient to establish that pneumoconiosis was not a contributing cause of the

[7] The administrative law judge found that "the letters submitted by Dr. Kirby . . . consist of little more than conclusory, one- or two-paragraph statements which, although they typically indicated that Dr. Kirby had reviewed the miner's records, contained no explanation for any of his conclusions beyond a mere recitation of the miner's coal mine employment history, and no explanation for how the underlying documentation supported his conclusion." Decision and Order at 37.

miner's total disability, *see Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990), we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.204(b).

Pursuant to Section 718.205(c), claimant contends that the administrative law judge applied the wrong legal standard because she required claimant to prove that pneumoconiosis was the "immediate and direct cause" of the miner's death. Claimant's Brief at 3.

Death will be considered due to pneumoconiosis if claimant establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(c)(2). The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Here, contrary to claimant's contention, the administrative law judge applied the *Shuff* standard and found that claimant failed
to establish by a preponderance of the evidence that the miner's death was due to "or hastened by" pneumoconiosis. Decision and Order at 39-40. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Kleinerman, based on his qualifications, experience, and the persuasiveness of his rationale, *see Clark*, *supra*; *Wetzel*, *supra*, and found that Dr. Kleinerman's "conclusion was affirmed by other well-qualified physicians" who, after reviewing "substantially the same material," concluded that the miner's pneumoconiosis was too mild to have contributed in any way to his death. Decision and Order at 39-40; Director's Exhibits 112; Employer's Exhibits 1, 2, 5, 6, 9, 11; *see Shuff*, *supra*. Inasmuch as the administrative law judge considered all relevant evidence under the applicable legal standard and provided valid reasons for her weighing of the medical opinions, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge